No. 80-1147

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ALEXANDER L. ST
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL 1576,
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*:

§ 703 (h) 7

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The district court focused on the legality of the conduct of petitioner, Local 1576, in the proceedings on remand from the Fifth Circuit's first decision. At the conclusion of those proceedings, the district court found that Local 1576 had not committed any discriminatory act and had not taken part in the discriminatory work allocation rules that were used by the other ILA locals in the case—the work allocation rules (generally the so-called "50-50 rule") being the sole predicate for the Title VII violation found as to the other locals. Respondents in their briefs in opposition to the petition for certiorari seek to create the misleading impression that the district court found to the contrary by quoting findings, made in 1971, which applied to the other locals in the case but not to Local 1576.

The 1971 findings were made in a proceeding that encompassed 37 local unions. Out of the 37 local unions, Local 1576 was *the only one* that did not operate under some variant of the offending work-division rule. The court found that Local 1576 had a work jurisdiction that was limited to one category of cargo, and that it did not share that work with any other local. Each of the other locals was party to some arrangement for dividing identical work within a single bargaining unit between local unions that were alike in every respect except the race or national origin of their members. The most common work-division practice was to divide the available work 50-50 between black and white locals in the same port; the method for achieving that division was to allow the white local to load or unload one end of each ship, while the black local loaded or unloaded the other end of the same ship. The core of the district court's findings are addressed to that practice, concluding that dividing the work according to a fixed percentage without making allowance for differences in the number of longshoremen of each race seeking work, had the effect of denying employment opportunity based upon race or national origin.

Pet. App. 42a-45a, 48a. Because Local 1576 was found to be part of no such proportional work allocation, the district court's findings on this issue did not apply to Local 1576. See Pet. App. 48a.[1] In reviewing the district court's 1971 decision, the Fifth Circuit affirmed the holding that the work-allocation rules—to which Local 1576 had never been a party—constituted a violation of Title VII. The Fifth Circuit found no other violation.[2]

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[1] Respondent EEOC asserts, and respondents Locals 307 and Local 851 suggest, that the district court found that the existence of the specialized work jurisdiction of Local 1576 was a violation of Title VII. Brief of Respondent Equal Employment Opportunity Commission at 3, 12, 15 & n.8 (hereinafter "EEOC Br."); Brief of Respondent Local 851, at 10 n.8, 28 (hereinafter "Local 851 Br."); Brief of Respondent Local 307 at 5 (hereinafter "Local 307 Br."). All that the district court found on this point was "that individuals belonging to Local 1576 have been denied an opportunity to work as longshoremen, *because of restrictions on their charter*," Pet. App. 47a (emphasis added). (It is undisputed that the Local 1576 charter contains no restrictions pertaining to race or national origin.) The district court has never found (and there has been no evidence) that the members of Local 1576 were denied work opportunity because of their race or national origin or that the separate banana jurisdiction was created with intent to discriminate against any group. Providing for referrals to banana work through a separate local union, in a separate bargaining unit, is consistent with industry practice and National Labor Relations Board precedent, and serves legitimate interests of efficiency in unloading the cargo. Pet. at 5-6.

In addition, the creation and maintenance of a separate local union for banana jurisdiction does not deny work opportunity to anyone. Anyone who wants to work in longshoring can work through any of the locals, regardless of membership or nonmembership. See *infra*, at page 4. In fact, the record shows that a number of years ago, when Local 1576 asked the ILA about enlarging its charter, it was told that if there was too little banana work, and its members wanted access to other work, they should apply for work at the hiring halls of the other local unions. The record shows that members of Local 1576 have obtained general-cargo work through the hiring hall of Local 307. Pet. App. 47a.

[2] Respondent EEOC considers it significant that in the petition for certiorari filed in 1975 on behalf of all the locals that were then contesting the EEOC action, no separate argument was made to exempt Local 1576 from the remedy of merger that the Fifth Cir-

2. Respondents try to divert attention away from the fact that Local 1576 has not been found to have been involved in any act of discrimination, by constant references to "segregation" and the "tradition" in Galveston that longshoremen sought work from the local whose membership matched their own race.[3] But neither "segregation"—which in the case of Local 1576 means only that it is "predominantly" Mexican-American[4]—nor this

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cuit held mandatory whenever a denial of employment opportunity was found. EEOC Br. at 13, 21. In the procedural context of that petition, no such significance can be found. Based upon the 1971 findings, the district court entered an "Interlocutory Decree," denying the remedy of merger in each port, instead ordering the creation of common hiring halls and seniority lists. The Government filed an interlocutory appeal from only that part of the Interlocutory Decree that denied merger. The Galveston local unions did not file a cross-appeal from the inclusion of Local 1576 in the common hiring hall required by the Interlocutory Decree, but instead filed a motion in the district court asking that the Decree be modified to exclude Local 1576 from the common hiring hall. (That motion set in train the events that produced the 1979 Order at issue here.) Having taken no cross-appeal nor having presented any issue focusing on Local 1576 to the court of appeals, the 1975 petitioners could not have raised such an issue in their petition for certiorari.

[3] EEOC Br. at 9-10, 12-14, 15 n. 8, 18 nn. 11 & 12, 19, 21; Local 851 Br. at 26-28.

[4] Pet. App. 40a. Respondents make repeated assertions that it was "stipulated" or "conceded" that all the ILA locals were "chartered and maintained on the basis of race or national origin," relying on the district court's description of a stipulation that was filed July 13, 1970, at the beginning of the 1971 trial. EEOC Br. at 3, 9, 11 & n. 6, 12, 14; Local 851 Br. at 10 n. 8, 17, 20; Local 307 Br. at 4-5; *see* Pet. App. 40a, 41a. Insofar as that stipulation applies to Local 1576 it is entitled to little, if any, evidentiary weight. It is, first, not a stipulation that its contents are fact, but a stipulation that purports to show what the president of Local 1576 would testify about certain matters, including the chartering of Local 1576 in 1937. The president of Local 1576 testified at trial that his experience with the ILA and Local 1576 began in 1956; it is therefore clear that he had no knowledge of the original chartering of the local. (Inasmuch as ¶ 35 of the Stipulation stated that any party remained free to "offer evidence which enlarges or explains the

"tradition" supply a basis for finding any conduct by Local 1576 that violates Title VII or that justifies the relief ordered by the court of appeals.

There was no evidence that Local 1576 had taken any action to encourage or preserve the tradition. Pet. at 6-7. Moreover, the necessary implication of the district court's findings is that the actions of Local 1576 have run counter to the tradition. The district court described the tradition, then immediately made the following findings in sequence: Local 1576 never discriminated against anyone; it has black and white members, and either has or has had black and white foremen; Local 1576 has regularly advertised on the radio, in English and Spanish, to obtain additional longshoremen for days when it had extra work. Pet. App. 16a-17a. It is critical to understand in this regard that membership in Local 1576 is not—and by law cannot be—a determinant of who may be assigned work out of the Local 1576 hiring hall. Nonmembers may be assigned such work and are eligible to build up seniority in Local 1576 on the same basis as members. As of 1979, larger numbers of black long-

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matters stipulated or to contradict any matter" at trial, the testimony of the local president that he had no knowledge of part of the contents of the Stipulation leaves the evidentiary status of that portion of the Stipulation in considerable doubt.) Second, the Stipulation on its face is ambiguous, stating not that Local 1576 was chartered as a local "for Mexican-Americans," but that it was chartered in 1937 "with the expectation at that time that the membership . . . would be Mexican-American," although the charter contained no such limitation. Stipulation ¶ 10. In the 1979 hearing, an officer of Local 1576 seemingly contradicted this statement. He testified: "All the original banana charter didn't belong to the Americans of Mexican descent." 79 Tr. 177. Third, even if the Stipulation can be taken as evidence of the intent in 1937, that intent is irrelevant, because the charter became inactive in the 1950s, and was reactivated in 1962. Pet. at 6-7. The record is silent about the intent underlying that event.

The Stipulation says nothing about the local unions having been "maintained" on the basis of race. It appears that the district court's use of that term, Pet. App. 41a, means the same as its finding that the locals were not merged or re-chartered after the effective date of Title VII. *Id.*

shoremen—and a greater proportion of the total—were working through the Local 1576 hiring hall than had chosen to become members of the local. There is no evidence in this case that any person was ever refused work by Local 1576 on account of race or national origin.

3. The EEOC relies on the principles of *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), and *Teamsters* v. *United States*, 431 U.S. 324 (1977), to support its argument that it is appropriate to require that Local 1576 be merged into the other locals. EEOC Br. at 13-19. Those decisions command the opposite result, however, and highlight the mistaken premises of the EEOC's argument. *Franks* and *Teamsters* both hold that the object of relief under Title VII is to place victims of discrimination into their "rightful places," that is, the positions they would have occupied in the absence of the discriminatory practice that is found to violate the Act. Under *Franks* constructive seniority relief is available to identifiable victims who applied for a position but were turned down because of race, 424 U.S. at 774-776. *Teamsters* extended that remedy to particular individuals who can satisfy their burden of proof that they would have applied for a job but for knowledge of a "consistently enforced discriminatory policy" that would have made such an application a futile act. 431 U.S. at 364-371.

There are no persons in this case to whom the remedy of constructive seniority in Local 1576 could be awarded under either *Franks* or *Teamsters*. In addition to the express finding that Local 1576 never turned anyone away because of race or national origin, there is no testimony or other evidence in this lengthy record that points to a single individual who was denied work referral or membership by Local 1576 or who claims to have been deterred from applying because of even a subjective belief that Local 1576 would discriminate against him. In *Teamsters*, where the employer had been engaged in "an extended pattern and practice of discrimination" by excluding minority employees from line driver jobs, the Government argued that all minority city drivers

who were qualified as line drivers should be given constructive seniority from their date of hire because a court could presume they would have known of the discrimination and would have been deterred from applying for a line driver job. This Court rejected that argument, holding that no such presumption could substitute for proof "with respect to each specific individual." 331 U.S. at 368-371. The EEOC's argument in this case has even less to support it than the argument that was rejected in *Teamsters*. The EEOC argues that giving *every* longshoreman the right to use all his general-cargo seniority to compete for banana handling work is a necessary remedy. The effect on work referrals through Local 1576 is the same as if all longshoremen, without proof that they ever before had any interest in banana work, were given constructive seniority in Local 1576, retroactive not just to a date when they might have applied for work through Local 1576, but retroactive to their earliest seniority date in any local union in the port. Such a result cannot masquerade as a "rightful place" remedy.

4. Respondents also suggest that merger is necessary to end the "vice of segregation," EEOC Br. at 17-18 & n.11, or that absent merger, Local 1576 will remain "separate but equal," Local 581 Br. at 26-27. If, without a merger, Local 1576 remains predominantly Mexican-American, it will be only because whites and blacks have chosen not to join. The issue here is not access to Local 1576 by whites or blacks; rather, what respondents seek, and what the Fifth Circuit ordered, is the opportunity for whites and blacks who have never had or wanted anything to do with the work of the Local to move ahead of those who have performed the work for years.

For over fifteen years the law has provided every longshoreman in Galveston a right to apply at any local union and be referred for work or accepted as a member without regard to race or national origin. The district court found that Local 1576 has excluded no one on prohibited grounds. Accordingly, if Local 1576 does not have a larger number of white and black longshoremen

as members or holders of seniority, on this record and the findings of the district court the only explanation is that the majority of white and black longshoremen in Galveston have chosen not to apply at Local 1576. Beginning at least two years preceding the 1979 hearing, Local 1576 has had enough banana work available one day a week to make special recruiting efforts; anyone who takes advantage of that opportunity, by working just one day a week, can accumulate seniority credit in Local 1576, while continuing to work and accumulate seniority through another local on other days. Those longshoremen who do so come in on the ground floor, just like everyone else who has acquired seniority in Local 1576. It is apparent from Local 851's Brief that the longshoremen in the other locals are not content with this opportunity, but seek, in effect, to come in at the top of the seniority list and be referred for banana work based upon seniority in general-cargo work, even though they had no prior interest in handling bananas.[5]

5. Local 851 includes an elaborate argument in an effort to show that having a separate seniority system for banana handling, apart from seniority for general-cargo work, is not *bona fide* within the meaning of § 703(h) and *Teamsters* v. *United States*. Local 851 Br. at 14-18. That argument cannot take the place of a judicial finding on the question whether the separate seniority is the result of discriminatory intent. *See* Pet. at 14-15. Moreover, the record shows that the system using banana seniority for banana referrals "applies equally to all races and ethnic groups"; it "locks" no-one into any category, because a longshoreman can work through more

[5] See Local 851 Br. at 16 n. 11, 21. The EEOC's argument, EEOC Br. at 16-17, that Local 1576 is objecting to one particular method for calculating merged seniority credits, is beside the point. The only change in seniority that the Fifth Circuit's decision necessarily requires is that referrals for banana work can no longer be made on the basis of seniority accumulated in banana work alone but must be made on the basis of seniority earned in any local in the port. Pet. App. 10a-12a. It is this change in seniority that violates the rule of *Teamsters*.

than one local and accrue seniority in more than one local at the same time; placing banana handlers (who work for a different employer, in a separate bargaining unit) in a separate seniority unit is "rational, in accord with the industry practice, and consistent with National Labor Relations Board precedents"; and it furthers legitimate interests of business efficiency, Pet. at 5-6; Brief of Amicus Curiae Southern Stevedoring Co. Accordingly it has the same characteristics that this Court found sufficient in *Teamsters* to establish the *bona fides* of the seniority system used by the employer and the union in that case. *See* 431 U.S. at 355-356.

6. Local 851 asserts that the district court did not "give the slightest hint that it could see any adverse changes in the business operations of Southern Stevedoring," the company that employs the longshoremen referred through Local 1576, and argues that there is no record evidence that such changes would occur. Local 851 Br. at 22-23. The EEOC, reading the record correctly, acknowledges both that the Fifth Circuit's decision would put an end to the system that supplies specialized crews of banana handlers to the employer, and also that the district court found that the banana business might move to another port if the members of Local 1576 lose their seniority preference for banana work. EEOC Br. at 20-21. The record contains ample evidence to support both conclusions, primarily in the form of extended testimony by Ben Harris, president of Southern Stevedoring.[6]

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[6] 77 Tr. 97-211. The substance of that testimony is summarized in the Brief of Amicus Curiae Southern Stevedoring Co.

Local 851 also asserts that "many letters and pleas by the Mexican-Americans [were] sent directly to the district court," implying that these *ex parte* communications were the true reason for the ruling. Local 851 Br. at 25-26 n. 16. It should be noted that the record citation Local 851 relies upon for this assertion is a reference to letters from members of Local 329 (one of the black locals), which the district court placed in the docket, 79 Tr. 4, 255, 258-60. The docket list shows that the district court received two letters connected with Local 1576, one of them from the president of Southern Stevedoring; both were filed of record, and copies were

Local 851's argument is apparently based on its belief that the petition misrepresents banana handling as requiring "unusual and unique" skills. Local 851 Br. at 7 & n. 5. The petition makes no such contention, but relies upon Mr. Harris's testimony that Local 1576's efficiency in banana handling depends upon the specialization and teamwork of a core of experienced longshoremen who work together regularly on the same operation. 77 Tr. 125-29. Also, Local 851 asserts that including inexperienced workers in banana gangs does not erode the efficiency of the operation. Local 851 Br. at 8. That assertion is misleading. Ben Harris testified that a *small number* of inexperienced men on a banana crew can be assigned so that they do not disrupt the operation, 77 Tr. 149, but that a crew with more than a small number of inexperienced or occasional banana workers could not achieve the efficiency he gets from Local 1576, 77 Tr. 125, 127-28.

EEOC tries to escape the finding of a merger's likely effect on the employer by arguing that the supporting evidence is not certain but only speculative. It says that "many" of the members of Local 1576 could continue handling bananas and the merged local would have an incentive to make unspecified accommodations to keep the banana trade in Galveston.[7] It is irrelevant that "many" members of Local 1576 may have sufficient seniority in the merged local to continue in banana work; large numbers of general-cargo longshoremen have equal

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mailed to all counsel (Docket entries of 8/8/73, 10/1/73, and 10/1/76).

[7] EEOC also argues that "at an earlier stage in this litigation" Local 1576 took a position inconsistent with its current argument about the threatened effects on the efficiency of the banana operation by itself asking "to have the jurisdictional limitations in its charter lifted so that it could compete for other longshore work." EEOC Br. at 20. The district court's finding, and the evidence, were that Local 1576 had asked the ILA—not the district court—to "enlarge the charter." Pet. App. 47a; 71 Tr. 2425-26. The evidence does not suggest that such an enlargement, if granted, would have put an end to the specialized crews for banana handling.

or greater seniority, so that on any day that a banana ship is the only ship in port it can be expected that a large number of senior longshoremen who are not experienced in banana work would exercise their seniority rights to claim that work. It remains to the imagination to consider what accommodations the merged local might be able to make consistent with the court of appeals' ruling; the EEOC suggests none. One thing is clear: the system of specialized seniority that has proved to work efficiently in the past will no longer be able to operate. That result is an unnecessary interference in the business operations of Local 1576 and Southern Stevedoring.[8]

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the writ of certiorari should be granted to review the judgment of the court of appeals.

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[8] EEOC argues that there is no conflict between the decision below and *EEOC* v. *Local 14, International Union of Operating Engineers*, 553 F.2d 251 (CA 2 1977), because the Second Circuit in *Local 14* only ordered a hearing, and a hearing was held in this case. EEOC Br. at 10-11 n. 5. In addition to ordering a hearing, however, the Second Circuit announced the rule that was to be applied at that hearing: Title VII relief may not interfere with a defendant's business operations more than necessary. In this case a hearing was held, but the court of appeals disregarded the evidence about the likely effect of merger on the business of handling bananas and ordered the merger even though it is not necessary to remedy the only Title VII violation that has been found.